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No. 84-80

In The

Supreme Court of the United States

October Term, 1984

VIRGINIA T. HANZLIK,

Petitioner,

vs.

FREDERICK F. PAUSTIAN,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS OF LAW PRESENTED FOR REVIEW

A. WHETHER IN A MEDICAL MALPRACTICE ACTION INVOLVING KNOWLEDGE BEYOND THE GRASP OF AVERAGE JUROR, EXPERT TESTIMONY IS REQUIRED TO PROVE NEGLIGENCE OF OTHER PHYSICIANS, OR WHETHER AN AFFADAVIT FROM A LAY PERSON CAN BE SUFFICIENT TO MEET THAT REQUIREMENT

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CITATION OF THE REPORTED OPINION WHICH IS SOUGHT TO BE REVIEWED

The Respondent accepts the statement of the Petitioner for this section.

JURISDICTIONAL STATEMENT

The Respondent accepts the statement of the Petitioner for this section.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Respondent accepts the statement of the Petitioner for this section.

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STATEMENT OF THE CASE

The Respondent relies on the appendix to Petition for Writ of Certiorari for his statement of the case. The appendix to the Petition for a Writ of Certiorari contains the verbatim opinion of the Supreme Court of the State of Nebraska in its decision affirming the granting of a summary judgment for the Respondent in this case. A motion for rehearing filed by the Petitioner herein was overruled without comment on April 11, 1984 by the Supreme Court of the State of Nebraska.

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SUMMARY OF ARGUMENT

1) The Decision Of The Supreme Court Of The State Of Nebraska In This Case Is Not In Conflict With Federal And State Decisions.

2) **The United States Supreme Court Has Denied Certiorari In Other Cases Petitioning On Grounds Of Violation Of Due Process Of Law.**

3) **This Case Does Not Require The Exercise Of The Supreme Court's Extraordinary Discretionary Jurisdiction And The Granting Of A Writ Of Certiorari Would Establish A Dangerous Precedent In Other Civil Cases.**

ARGUMENT

I. The Decision Of The Supreme Court Of The State Of Nebraska In This Case Is Not In Conflict With Federal And State Decisions.

The Petitioner in this case is attempting to show a violation of her right to due process under the United States Constitution because the Nebraska Supreme Court would not accept the affidavit of her lawyer interpreting some medical signs and symbols, as competent and sufficient evidence of malpractice.

The fundamental question here is whether or not the Nebraska Supreme Court was correct in requiring actual proof of medical negligence by a competent witness, as opposed to the conclusionary affidavit of a lay witness.

The requirement that expert testimony is necessary for the Plaintiff to make a prima facie case in a medical malpractice action is one which has been followed by virtually every State of the Union, and all of the Federal Appellate Courts. In Nebraska, the case of *Winters v. Rance,* 125 Neb. 577, 251 N.W. 167, held that "When case demands skill and judgment of surgeon with respect to

employment of scientific technique, negligence in treating of injury must be proved by expert witnesses." This general rule is upheld by the Nebraska Supreme Court in *Halligan v. Cotton,* 193 Neb. 331, 227 N.W. 2d 10, and *Kortus v. Jensen,* 195 Neb. 261, 237 N.W. 2d 845.

Lay testimony is simply insufficient when the procedures followed by a doctor charged with negligence are beyond the scope of knowledge of the ordinary layman. In the factual setting of this instant matter, Dr. Paustian, practicing his specialty of gastroenterology, used progressively sized dialators to alleviate a condition of a stricture in the Plaintiff's/Petitioner's esophagus. Certainly the Supreme Court of the State of Nebraska was not out of line in requiring expert testimony to prove the standards required of the treating physician, finding that this procedure is outside of the comprehension of the average juror, and correctly refusing to apply a doctrine of res ipsa loquitur.

This general principle of the necessity of expert testimony is not unique to Nebraska. Other cases across the country and federal appellate decisions fall in line behind the Nebraska court in upholding this fundamental rule of law. (See *Savage v. Christian Hospital Northwest,* 543 F.2d 44; *Speer v. U.S.,* 512 F.Supp. 670, affirmed 675 F.2d 100; *Haven v. Randolph,* 494 F.2d 1069, 161 U.S.App. D.C. 150; *Washington Hospital Center v. Butler,* 384 F.2d 331, 127 U.S.App.D.C. 379; *Pegram v. Sisco,* 406 F.Supp. 776, affirmed 547 F.2d 1172.

This Court has addressed this question in the case of *Karp v. Cooley,* 349 F.Supp. 827 (1972), heard by the

United States Court of Appeals for the Fifth Circuit and reported at 493 F.2d 408. A Petition for Writ of Certiorari was denied by the United States Supreme Court on October 15, 1974. In that case, the Court was asked to consider whether or not, among other things, the Plaintiff must produce expert medical testimony to establish a medical standard of conduct, deviation from that standard, and proximate cause. The Plaintiffs in the District Court action had attempted to introduce medical articles to establish negligence. The Court below found that they were not evidence of negligence or proximate cause, and that the establishment of a medical standard can only be proved by medical testimony.

The case which presents itself instantly to this Court for consideration on the Petition for Writ of Certiorari is similarly structured. The Plaintiff in this appeal in seeking to gain a hearing on the "due process question" merely begs the ultimate question of whether or not the established doctrine of required expert testimony is a sound one. Courts all over the Country have followed this doctrine for decades.

The law of the United States is standard on this issue. Cases are collected in the Decennial digests and State and Regional Reporters under the West keynote of "Physicians and Surgeons" 18.80 (6), and without reciting references to each of these cases, it is sufficient to say that each of them upholds this general principle and that this is a uniform rule of law governing malpractice cases in this country.

II. The United States Supreme Court Has Denied Certiorari In Other Cases Petitioning On Grounds Of Violation Of Due Process Of Law.

The case of *Karp v. Cooley*, cited above, is but one of the various due process cases passed upon by the United States Supreme Court. Certiorari was denied in that case.

The case of *Edwards v. United States*, 519 F.2d 1137 (1975), cert. den. 425 U.S. 972, 48 L.Ed.2d 795 (1976), was another medical malpractice case and the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was denied on May 19, 1976. *Edwards* stood for the proposition that state law controls the issue of liability in a medical malpractice case and that expert testimony is necessary to establish the negligence of a physician. The Plaintiff did produce certain evidence in that case, and a Dr. Liebendorfer went so far in his testimony for the Plaintiffs to say that he believed that the Defendant physicians committed a mistake in judgment. The Court found that that does not establish a professional standard of care and a deviation from that standard. On that ground, the Court dismissed the case, and subsequent appeals through the Fifth Circuit and on Petition for a Writ of Certiorari to the Supreme Court, met with the same fate.

The claim of due process was made, and Petitions for Writs of Certiorari were denied in the cases of *State v. O'Kelley*, 124 N.W.2d 211, *Rhodes v. Edwards*, 382 U.S. 943, 135 N.W.2d 453, *State v. Jensen*, 105 N.W.2d 459 and *Presbytery of Southeast Iowa v. Harris*, 226 N.W.2d 232.

III. This Case Does Not Require The Exercise Of The Supreme Court's Extraordinary Discretionary Jurisdiction And The Granting Of A Writ Of Certiorari Would Establish A Dangerous Precedent In Other Civil Cases.

Anyone may assert the grounds of denial of due process as a stepping stone for an appeal to the United States Supreme Court. If the Court herein grants the Writ of Certiorari requested, it would simply open a flood-gate of further litigation on the tenuous grounds asserted by the Petitioner herein.

The Petitioner should not be allowed to frame his issues under the guise of "due process of law", when the real issue is one of substantive state law, followed universally across country: Medical malpractice actions demand expert medical testimony.

To permit an Affidavit from a lay person interpreting some signs and symbols from an unknown source in a manner unknown to anyone except the Affiant, is tantamount to allowing proof of any issue by any person regardless of his or her competency. It is not an unfair requirement that expert testimony is demanded in a medical malpractice case. As the cases above indicate, such issues are generally within the scope only of experts' knowledge, and demand an interpretation for lay jurors.

The granting of a Writ of Certiorari in this case would merely open the flood-gates for thousands of other cases based on nothing more than a conclusionary statement from an attorney representing one of the parties.

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CONCLUSION

This case should not be heard by the United States Supreme Court. The general principles of this case have been heard in every state court, in every United States District Court, in every Court of Appeals throughout the land, and the questions have even been presented to the United States Supreme Court. A universal rule has emerged, and it is a standard of law which is followed uniformly throughout the Country.

The granting of a Writ of Certiorari would fly in the face of these prior well-reasoned decisions of appellate courts, would reverse prior holding of this Court, and would lay the groundwork for a never-ending stream of appeals on the basis of nothing more than an Affidavit based on whatever facts and conclusions an attorney wishes to make. This is clearly not the law now, nor should it be in the future.

Respectfully submitted,

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